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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 920

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WRIGHTSMAN PETROLEUM COMPANY, A CORPORATION, FOR ITSELF AND C. J. WRIGHTSMAN, ITS SOLE STOCKHOLDER AND BENEFICIARY IN DISSOLUTION, *Petitioner*,

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

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CHARLES D. HAMEL,
*Counsel for Petitioner.*

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*vs.*

THE UNITED STATES.

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner, Wrightsman Petroleum Company, a Corporation, for itself and C. J. Wrightsman, its sole stockholder and beneficiary in dissolution, prays for Writ of Certiorari to review the judgment of the United States Court of Claims filed October 7, 1940 (R. 38).

### Opinion Below.

The opinion of the United States Court of Claims is reported in 35 Fed. Supp. 86 (R. 34).

### Jurisdiction.

The judgment of the Court of Claims was entered on October 7, 1940 (R. 38). This petition is filed under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

## Question.

The question herein presented is whether an amended claim for refund filed after the prescribed period for filing claims, and prior to the rejection of any claim by the Commissioner of Internal Revenue, is permissible where the Commissioner has already been fully apprised by audit or otherwise of the deductions and facts in support thereof claimed in the amendment.

## Statutes and Regulations Involved.

The applicable portions of the pertinent statutes and Treasury Regulations will be found in Appendix A, p. 14, *infra*.

## Summary Statement of the Matter Involved.

This suit was brought by petitioner to recover Federal income tax for the taxable year 1927. During the said taxable year petitioner owned the entire outstanding stock of certain other corporations (R. 19).

By virtue of agreements (R. 19-21; 21-23; 24-25; 26-27) providing for the assignment of certain oil and gas leases by petitioner and a subsidiary, the Osage Oil Corporation, petitioner and its said subsidiary received during the taxable year 1927 what are commonly called "in-oil payments" [1] (R. 21, 22-23, 25, 27).

On July 26, 1927, the Wrightsman Oil Corporation, another of petitioner's subsidiaries, was dissolved and at the time of its dissolution petitioner had not recovered the sum of $40,396.17 representing a portion of cash advanced by petitioner to said subsidiary (R. 27).

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[1] The provisions of the various agreements were not essentially the same in text but in substance they all provided for the payment of cash and in addition in-oil payments or payments in oil if as and when received.

On March 15, 1928, petitioner, as the parent corporation, duly filed a consolidated return of income for itself and affiliates (R. 28). Thereafter, on May 27, 1929, petitioner duly filed an amended consolidated return of income for the calendar year 1927 showing a tax liability of $12,199.81, and a "refund due" of "$15,290.68" (R. 28-29).

On August 17, 1928, the Commissioner of Internal Revenue asserted a deficiency against the Osage Oil Corporation for the year 1926 in the amount of $17,170.87. Petitioner admitted liability for additional taxes in the amount of $1,713.53 but denied liability for the balance (R. 30). On May 27, 1929, petitioner filed a claim for refund for $15,290.68 for the year 1927, setting out the foregoing facts and concluding as follows (R. 30).

> "The prosecution of this claim for refund is contingent upon the final determination by the Bureau, or other proper tribunal, that the Osage Oil Corporation is liable for such additional tax for said year 1926."

Thereafter, an investigation of all of the accounts of petitioner and its affiliated subsidiaries for the calendar year 1927 was made by an Internal Revenue Agent in Charge (R. 30). Under date of July 8, 1929, said Revenue Agent rendered to the Commissioner a report in which the Agent advised the Commissioner that petitioner claimed percentage depletion of the said in-oil payments (R. 30-31). The report contained schedules showing the amounts of the in-oil payments received by petitioner as aforesaid, and also showed the unrecovered sums advanced by petitioner to the Wrightsman Oil Company (R. 31).

Thereafter, under date of March 10, 1930, the said Internal Revenue Agent in Charge rendered a supplemental report in which he again advised the Commissioner that petitioner claimed percentage depletion on the said in-oil payments.

Thereafter, on January 27, 1931, one J. C. Wilmer, then Deputy Commissioner of Internal Revenue, advised petitioner of a proposed overassessment in its favor for the calendar year 1927 in the amount of $4,602.66 (R. 31-32).

Thereafter, on February 7, 1931, within the statutory period, petitioner filed with the Collector of Internal Revenue at Oklahoma City, Oklahoma, a supplemental claim for refund for the calendar year 1927 in the amount of $4,602.66 (R. 32). Said claim for refund referred to the foregoing letter dated January 27, 1931, from J. C. Wilmer, Deputy Commissioner, and also contained the following (R. 32):

> "The proposed refund of the Treasury Department of the United States Government in the above sum is hereby accepted by Wrightsman Petroleum Company with the specific understanding that such payment shall in no wise prejudice or conclude the rights of the said Wrightsman Petroleum Company and the Osage Oil Corporation, or either of them, to assert, demand and/or maintain its or their, or either of their, claims for refund or credit growing out of the assessment for income taxes for the years 1926 and 1927, or either of said years, against Wrightsman Petroleum Company or Osage Oil Corporation, or either of them, for said years 1926 and 1927, or either of said years."

Thereafter, on November 27, 1934, Charles T. Russell, then Deputy Commissioner of Internal Revenue, advised petitioner by letter that a redetermination of its tax liability for the calendar year 1927 showed an overassessment in favor of petitioner of $1,040.06 (R. 32).

On March 4, 1935, petitioner duly filed an amended claim in which it asked for the refund of $15,650.68 for the calendar year 1927, upon the following grounds, together with detailed facts in support thereof (R. 33):

> "(1) Additional depletion in the amount of $67,830.69 with respect to the aforesaid items of gross in-

come from retained interests in oil and gas leases, and

"(2) A loss on the liquidation of the Wrightsman Oil Company in the amount of $40,396.17."

On August 28, 1935, the Deputy Commissioner of Internal Revenue, by letter, advised the petitioner that its claim filed on March 4, 1935 would be disallowed, on the ground that it was barred by the statute of limitations (R. 33). Notice of rejection was mailed to petitioner on September 28, 1935 (R. 33).

On November 7, 1935, the Commissioner of Internal Revenue notified the petitioner by registered mail that its claims for refund were rejected to the extent not previously allowed (R. 33).

Thereafter, on July 22, 1936, the petitioner duly filed its petition in the Court of Claims (R. 1) and on October 7, 1940, the Court of Claims decided as a conclusion of law that the petitioner was not entitled to recover and its petition was dismissed (R. 33).

In its opinion (R. 24-38), the Court held that the amendment filed March 4, 1935 was not timely filed or the perfection of a timely claim. The Court held that the formal claims for refund related to different grounds for recovery and that the oral claims made to the Internal Revenue Agent did not comply with the statute.

On November 20, 1940, the petitioner filed a motion for new trial (R. 38). This motion was overruled by the Court on January 6, 1941 (R. 38).

**Specification of Errors to be Urged.**

The Court of Claims erred:

(1) In holding that under the facts and circumstances herein, the amended claim filed March 4, 1935, was not timely filed;

(2) In failing to hold that the said amendment, filed prior to the rejection of any claim, was a timely amendment of

the formal claims filed on May 27, 1929 and February 7, 1931 and the proper perfection of informal claims brought to the attention of the Commissioner of Internal Revenue in Internal Revenue Agent's reports dated July 8, 1929 and March 10, 1930;

(3) In failing to hold that the Commissioner of Internal Revenue was fully and timely apprised through examinations of petitioner's affairs, or otherwise, of deductions ultimately claimed in an amended claim for refund filed on March 4, 1935, and that the said amendment was, therefore, permissible;

(4) In dismissing the petition and failing to hold that petitioner was entitled to recover.

**Reasons for Granting the Writ.**

(1) The court below failed and refused to pass on the question of the permissibility of an amended claim for refund filed subsequent to the prescribed period for filing claims but prior to rejection of any claim where the Commissioner had already been apprised by audit and examination of the deductions claimed in said amendment and the facts in support thereof. The court, therefore, left open for decision by this Court an important question of Federal Revenue law.

This issue under the facts and circumstances, as aforesaid, has never been passed upon by this Court, but the rules applicable thereto are to be found in *United States* v. *Andrews*, 302 U. S. 517, 82 L. Ed. 398, and cases reviewed therein.[2] The pertinent precepts were stated by this Court in that case as follows (p. 524):

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[2] In *United States* v. *Andrews*, the Court reviewed its earlier decisions: *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 77 L. Ed. 626; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 77 L. Ed. 619; *United States* v. *Factors & Finance Co.*, 288 U. S. 89, 77 L. Ed. 633; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, 77 L. Ed. 1011; *George Moore Ice Cream Co.* v. *Rose, Collector*, 289 U. S. 373, 77 L. Ed. 1265.

"* * * Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, *has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained is permissible.* On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim." (Italics supplied.)

In the instant case following the filing of the formal claim for refund by petitioner on May 27, 1929, an Internal Revenue Agent conducted an audit and investigation of all the accounts of the petitioner and its affiliated subsidiaries for the year 1927. Under date of July 8, 1929, and March 10, 1930, the Internal Revenue Agent filed reports with the Commissioner of Internal Revenue and informed the Commissioner that petitioner claimed percentage depletion on in-oil payments received in that year.

During the course of the audit and examination, the Revenue Agent checked the in-oil payments and found them correct. At the same time, a Bureau of Internal Revenue engineer made a complete examination of petitioner's gross income from oil and gas leases including the said in-oil payments and determined an amount of alleged allowable depletion.

Through his examination, the Revenue Agent ascertained that the Wrightsman Oil Corporation had a deficit as of the date of its dissolution and that as of said date the petitioner did not receive the sum of $40,396.17, representing cash advances to said subsidiary and therefore had sustained

a loss in said amount. Also, within the statutory period and on February 7, 1931, petitioner filed with the Collector of Internal Revenue at Oklahoma City, Oklahoma, a supplemental claim for refund for the calendar year 1927 in sweeping general terms.

Thereafter, when on March 4, 1935, petitioner duly filed an amended claim for refund claiming percentage depletion on the in-oil payments and a loss sustained on the liquidation of the Wrightsman Oil Corporation, the Commissioner had already been made aware through his agent's reports that petitioner claimed depletion on the in-oil payments and that it had sustained a loss. There were already recorded in his files all the facts in support of the deductions claimed in the amendment. Had a new examination been conducted by the Revenue Agent following the filing of the amendment its path would have traversed the paths of the prior audit and research. The amendment was simply an adaptation of the relief already proved and recorded in the Commissioner's files. No additional relief was solicited.

These facts were brought to the attention of the court below on brief and in oral argument and the specific question posed whether or not the amendment of March 4, 1935, filed prior to rejection of any claim, formal or informal, was permissible since the Commissioner had been fully apprised by audit and examination of the items of deduction and the facts in support thereof ultimately claimed in the amendment. It is submitted that this exact question had not at that time been decided by, nor has it been as yet decided by, this Court.

Although the rules applicable to the facts and circumstances of this case are stated in *United States* v. *Andrews, supra,* the Supreme Court in that case expressly reserved opinion on the specific question raised herein. In that case

the taxpayer relied upon decisions of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States,* 79 Ct. Cl. 683, 7 F. Supp. 290 (Cert. denied 293 U. S. 599, 79 L. Ed. 692), and *Con P. Curran Printing Co.* v. *United States,* 83 Ct. Cl. 431, 15 F. Supp. 153 (Cert. denied 301 U. S. 686, 81 L. Ed. 1343). As to these two cases, this Court observed as follows (p. 320):

> "*We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts. A similar situation is disclosed in the second case.* The decisions were, however, put by the Court of Claims upon the same ground as in the instant case,—that a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items,—a view we hold untenable." (Italics supplied.)

Counsel urged in the Court of Claims that even though the question had not been decided by this Court, under the rules enunciated in *United States* v. *Andrews, supra,* as applied to the facts and circumstances of this case, the amendment of March 4, 1935, was permissible. Furthermore, during the oral argument, counsel for the Government advised the court that it would not contest the issues relating to the depletion of the in-oil payments and deduction for loss incurred through the liquidation of the subsidiary.[3]

The Court of Claims, however, did not pass on the question thus presented it in holding that the amendment of

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[3] Counsel for the Commissioner admitted to the Court of Claims that it had been definitely and conclusively settled by this Court in *Thomas* v. *Perkins,* 301 U. S. 655, 81 L. Ed. 1324 and *Anderson* v. *Helvering,* 310 U. S. 404, 84 L. Ed. 1277, that under the provisions of the assignment of the oil and gas leases herein involved, petitioner was entitled to a depletion allowance on the in-oil payments received in 1927.

March 4, 1935, was not timely filed. Nor did the court cite *United States* v. *Andrews, supra,* or any of the other decisions of this Court bearing on the question. The court seems, therefore, to have passed the issue on to this Court for adjudication.

In Mertens' *1939 Cumulative Supplement,* Paul and Mertens' *Law of Federal Income Taxation,* Section 51.17, the author makes the following observation about *United States* v. *Andrews, supra,* and *United States* v. *Garbutt Oil Company,* 302 U. S. 528, 82 L. Ed. 405, in connection with the question herein presented (p. 2414):

> "* * * These decisions still leave unanswered however, a question as to the exact circumstances under which an amendment might be made after the running of the statute of limitations in cases where the Commissioner is fully apprised, by his audit or otherwise, of the items of deduction or other adjustment ultimately claimed in the 'amended' refund claim, although it may be stated generally that such an amendment is permissible."

This question is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. In the decisions of this Court reviewed in *United States* v. *Andrews, supra,* and also in that case, as well as *United States* v. *Garbutt Oil Company, supra,* various situations were involved wherein the court decided that under the facts and circumstances an amendment was or was not permissible. The court did not, however, have before it the exact facts and question herein presented. A decision thereon by this Court would do much to alleviate continuous litigation which seems to have resulted from the lack of adjudication by the Supreme Court on this point.

(2) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Sixth Cir-

cuit in *Kales* v. *United States,* 115 F. (2d) 497, and the District Court in *Fort Pitt Bridge Works* v. *Lewellyn, Collector* (D. C. Pa., Dec. 30, 1940), 1941 Prentice-Hall Federal Tax Service, page 62,262.[4]

In *Kales* v. *United States, supra,* the Circuit Court of Appeals held that it is settled law that where a claim for refund rejectable as too general and as omitting to specify matters needing investigation has not misled the Commissioner but has been the basis of an investigation disclosing facts necessary to his action in making a refund, an amendment which makes more definite the matters already within his knowledge is permissible. Citing *United States* v. *Andrews, supra.* The court further held that a letter sent to the Commissioner within time for filing a claim for refund constituted an informal claim which was subsequently perfected by the filing of a formal claim subsequent to the statutory period.

In the instant case, the court below in its opinion states that the taxpayer informally put the Commissioner on notice that it claimed depletion on oil and gas sales but this was in the form of a protest against the "proposed additional assessment" and that this did not suffice as a claim for refund; that if the taxes were paid, notwithstanding the protest, and no claim for refund is later filed, it may well be assumed that the protest is abandoned.

In *Kales* v. *United States, supra,* the appellant stated in her letter to the Commissioner that she protested the assessment of the deficiency and was paying it under duress and solely to prevent the imposition of penalties and threatened

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[4] This Court seems to have taken cognizance of a conflict between a Circuit Court of Appeals decision and a District Court decision in a Federal Estate Tax case, decided March 3, 1941, *Maass, Ex.* v. *Higgins,* 1941 Prentice-Hall Tax Service, Par. 62,028, footnote (6).

Counsel for petitioner has received information from the United States Department of Justice that the *Fort Pitt Bridge Works* case will not be appealed by the Government.

attachment of her property. *The Circuit Court of Appeals held that appellant's letter was more than a protest, but was clear notice to the Commissioner that if he reversed his decision as to the value of certain stock, she was claiming a refund of that part of the original tax paid by her because of his March 1913 undervaluation of the said stock. That her statement was in the nature of a counterclaim. That the appellant's letter constituted an informal claim which the Commissioner did not reject for failure to comply with the Treasury Regulations and when considered in the light of all the facts and circumstances existing at the time, the formal claim filed subsequent to the statutory period was but a perfection of the informal claim and not a new and independent one. This seems clearly contrary to the decision in the instant case.*

In *Fort Pitt Bridge Works* v. *Lewellyn, supra,* the District Court held that general claims for refund amended prior to rejection by the Commissioner were timely and sufficient and therefore the taxpayer's action for recovery was not barred by the statute of limitations.

The District Court observed that a general audit was being made of the books of the plaintiff therein, for the year 1919, for the purpose of making adjustments contemplated both by the Bureau of Internal Revenue and by the plaintiff taxpayer at the time that the plaintiff therein filed its two claims with the Commissioner in November, 1923. In holding that the amendment filed prior to rejection by the Commissioner was not barred by the statute of limitations, the District Court quoted from the opinion of the Circuit Court of Appeals for the Third Circuit in *Allegheny Heating Co.* v. *Lewellyn,* 91 F. (2d) 280, as follows (p. 62,266):

> " 'From these decisions the court below drew the principle that if, in the consideration of a timely claim

for refund, the Commissioner, in the normal course of administrative procedure, is led into the field covered by a purported amendment, the latter, if filed before rejection of the original claim, will be treated as a part of such original claim, even though filed after the statute of limitations has run. This we think is a correct statement of the law.' "

It is, therefore, respectfully submitted that the decision in *Fort Pitt Bridge Works* v. *Lewellyn, supra,* is directly in conflict with the decision of the Court of Claims herein.[5]

**Conclusion.**

The question herein presented is an important one of Federal revenue law. A decision thereon will do much to relieve the uncertainty which now prevails when there arise facts and circumstances similar to those of the instant case. It would seem that this Court should decide the question once and for all. As the situation now stands, there is a conflict between the opinion in the court below and decisions in other Federal courts. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

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[5] It is significant that in the *Fort Pitt Bridge Works* case, *supra,* as in the instant case, the taxpayer had an admittedly meritorious cause which the Commissioner sought to disallow on the grounds that the amended claim was barred by the statute of limitations.

## APPENDIX A.

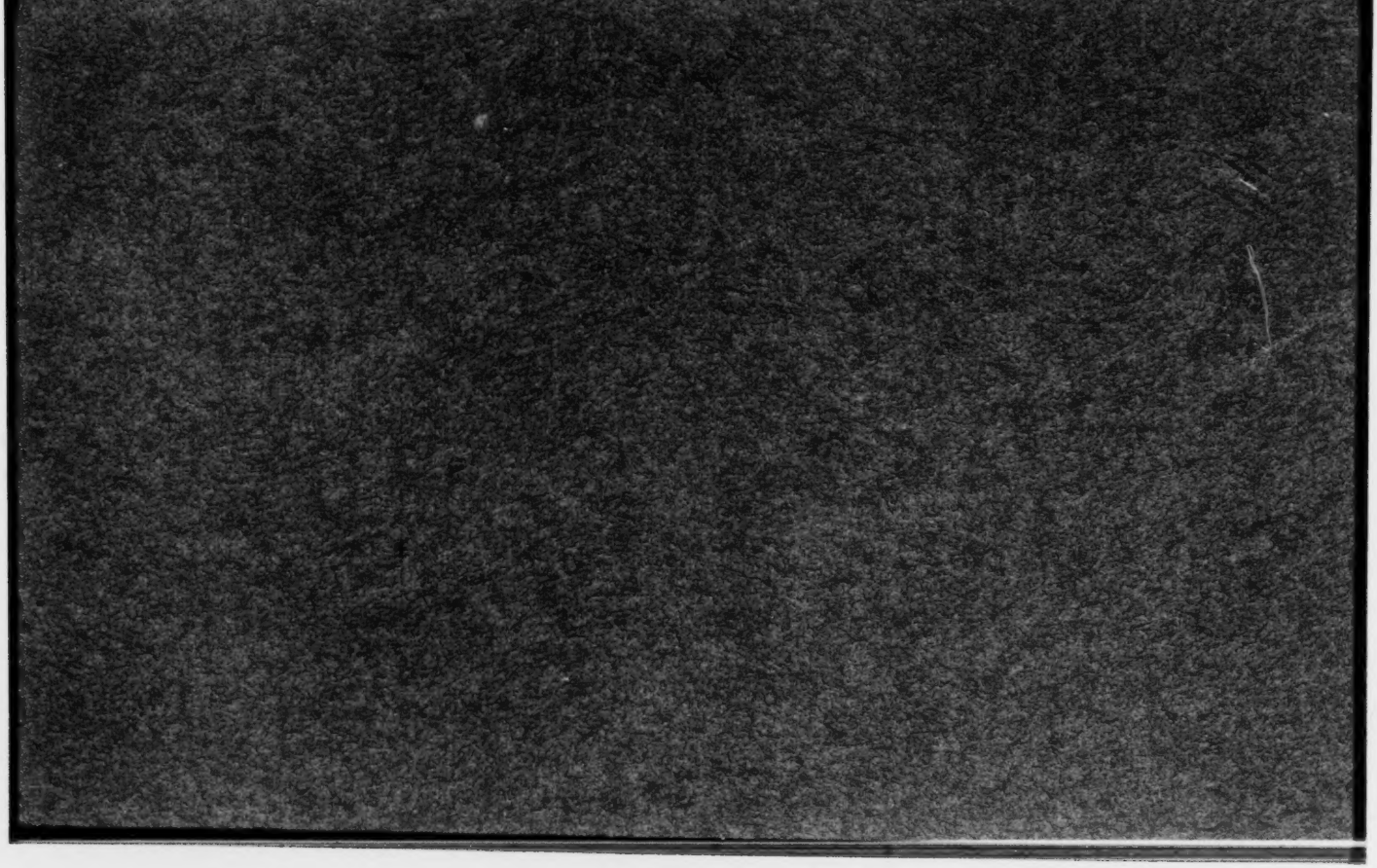
Section 284 (b) (1) of the Revenue Act of 1926 provides in part as follows:

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *"

Article 1305, Regulations 69, promulgated under the Revenue Act of 1926, provides in part as follows:

"(A) Except as provided in subdivisions (B), (C), (D), and (E) of this article, the Commissioner is prohibited from making credits or refunds of income and profits taxes after three years from the time the tax was paid in the case of a tax imposed by the Revenue Act of 1926, or after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such three or four year periods a claim therefor is filed. The amount of such credit or refund shall not exceed the portion of the tax paid during the three or four year period, as the case may be, immediately preceding the date of the allowance of the credit or refund, or if the credit or refund is based upon a claim, the amount of the credit or refund shall not exceed the portion of the tax paid during the three or four year period immediately preceding the date of filing such claim."



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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 920

WRIGHTSMAN PETROLEUM COMPANY, A CORPORATION, FOR ITSELF AND C. J. WRIGHTSMAN, ITS SOLE STOCKHOLDER AND BENEFICIARY IN DISSOLUTION, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court below (R. 34–38) is reported in 35 F. Supp. 86.

### JURISDICTION

The judgment of the court below was entered on October 7, 1940 (R. 38). A motion for a new trial was filed on November 20, 1940, and overruled on January 6, 1941 (R. 38). The petition for writ of certiorari was filed April 4, 1941 (R. 38). The jurisdiction of this Court is invoked

under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

### QUESTION INVOLVED

Whether the claim for refund upon which this suit is based, which was filed after the statutory period for filing claims, is a permissible amendment of certain timely claims.

### STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding

may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

**STATEMENT**

The special findings of fact of the Court of Claims (R. 18–33) may be summarized as follows:

Petitioner, the Wrightsman Petroleum Company, formerly the Hawk Oil Company, was organized as a corporation under the laws of Delaware in 1921. All of its stock, except qualifying shares, has at all times been beneficially owned by C. J. Wrightsman, petitioner, sole beneficiary in liquidation. The corporation was dissolved on July 24, 1933, but was continued for a period of three years subsequent thereto for the purpose of instituting suit (R. 18–19).

The Osage Oil Corporation and the Osage Trading Company were corporations, the entire capital

stock of which was at all times during the calendar year 1927 owned by the petitioner. The Wrightsman Oil Corporation, the entire outstanding capital stock of which was at all times during its existence owned by the petitioner, was dissolved on July 26, 1927 (R. 19).

On March 15, 1928, petitioner, as the parent corporation, filed a consolidated return of income for the year 1927 on behalf of itself and the other corporations above mentioned. Subsequently, all of the corporations filed a formal agreement to the effect that the entire tax liability for the taxable year 1927 should be assessed against and paid by petitioner. The consolidated return showed a total tax due of $27,490.49 which was paid in quarterly installments during the year 1928 (R. 28).

On May 27, 1929, petitioner filed an amended consolidated return for the calendar year 1927, showing a tax liability of $12,199.81 and a refund due of $15,290.68. In both the original return and the amended return there were included certain amounts designated as "oil earnings" received by petitioner and by the Osage Oil Corporation under certain contracts by which the petitioner and the Osage Oil Corporation respectively received a certain proportion of the earnings as consideration for the sale of their respective interests in oil and gas leases. No deduction was taken in either the original or amended re-

turn for depletion with respect to the above-mentioned "oil earnings" (R. 28–29).

On May 27, 1929, petitioner also filed a claim for refund in the amount of $15,290.68 for the calendar year 1927, stating therein as follows (R. 29–30):

> Under date of August 17, 1928, a deficiency for taxable year 1926, in the sum of $17,170.87 was asserted against the Osage Oil Corporation, subsidiary of the Wrightsman Petroleum Company, which proposed assessment is now pending on application of the taxpayer for review before the Treasury Department.
>
> Additional tax of $1,713.53 was agreed to by the taxpayer and payment made in that amount on November 15, 1928.
>
> The prosecution of this claim for refund is contingent upon the final determination by the Bureau, or other proper tribunal, that the Osage Oil Corporation is liable for such adiditonal tax for said year 1926.

After an examination made by a Revenue Agent, a report was rendered to the Commissioner of Internal Revenue on the operations of the entire affiliated group for the year 1927, showing a proposed overassessment of $8,953.26, resulting principally from adjustments due to correction of 1925 loss, correct profit and loss on sale of assets, depreciation adjustments, disallowance of bad debts, and personal expenses of stockholders. It was stated in the report that the taxpay-

er's representative did not agree to the adjustments and that one of the bases of the objection was that the taxpayer considered that it was entitled to 27½% depletion on payments received out of oil produced. In an engineer's report attached to this Revenue Agent's report, the amounts received from oil and gas sales were set forth as "Oil and gas payments not subject to depletion". Another exhibit attached to this report showed the deficit of Wrightsman Oil Company as of date of dissolution to be $162,473.34 (R. 30–31).

Another report under date of March 10, 1930, was made by the Revenue Agent and a copy furnished petitioner showing a proposed deficiency for the year 1927, of $463.77. This report contained the following statement (R. 31):

> Principal changes are due to elimination of prior year loss brought forward in accordance with decision Sweets Company of America, 12 B. T. A., P. 1285.
>
> All changes were fully explained to H. Lea, Secy., who does not agree to the adjustments.
>
> Basis for taxpayer's objections: Taxpayer objects to the changes in this report on the grounds that 1926 taxes have not been passed upon by the Board of Tax Appeals, where the case is now pending and claims allowance of 27½% depletion on oil and gas sales from properties where taxpayer claims oil and gas rights were retained thru previous

> sales. Owing to illness Mr. Lea is unable to prepare a formal protest for submission at this date but will submit same within the near future.

On January 27, 1931, the Deputy Commissioner of Internal Revenue advised petitioner of a proposed overassessment in the amount of $4,602.66. This overassessment was based upon the allowance of deduction for 1925 net losses and did not reflect any deduction on account of either (1) depletion with respect to the payments received by the petitioner under the above-mentioned agreements, or (2) loss on liquidation of Wrightsman Oil Company (R. 31–32).

On February 7, 1931, petitioner filed a supplemental claim for refund for the calendar year 1927, in the amount of $4,602.66, stating the grounds thereof as follows (R. 32):

> See letter from J. C. Wilmer, Deputy Commissioner, dated January 27, 1931 (IT:AR:E–6–LBV) copy attached hereto.
>
> The proposed refund of the Treasury Department of the United States Government in the above sum is hereby accepted by Wrightsman Petroleum Company with the specific understanding that such payment shall in no wise prejudice or conclude the rights of the said Wrightsman Petroleum Company and the Osage Oil Corporation, or either of them, to assert, demand and/or maintain its or their, or either of their, claims for refund or credit growing out of

> the assessment for income taxes for the years 1926 and 1927, or either of said years, against Wrightsman Petroleum Company or Osage Oil Corporation, or either of them, for said years 1926 and 1927, or either of said years.

On November 27, 1934, the Deputy Commissioner of Internal Revenue advised petitioner that a redetermination of its tax liability showed an overassessment in the amount of $1,040.06. This redetermination did not reflect any deduction for depletion with respect to the amounts received under the above-mentioned contracts or loss on liquidation of the Wrightsman Oil Company (R. 32).

On March 4, 1935, petitioner filed what it called an amended claim for refund of $15,650.68 for the year 1927, upon the specific grounds as follows, together with detailed facts in support of the claims (R. 33):

> (1) Additional depletion in the amount of $67,830.69 with respect to the aforesaid items of gross income from retained interests in oil and gas leases, and
>
> (2) A loss on the liquidation of the Wrightsman Oil Company in the amount of $40,396.17.

On August 28, 1935, petitioner was advised that its claim filed on March 4, 1935, would be disallowed on the ground that it was barred by the statute of limitations and notice of rejection was mailed on September 28, 1935 (R. 33).

Thereafter the Commissioner of Internal Revenue issued a certficate of overassessment to peti-

tioner for the year 1927, in the amount of $1,040.06, together with interest, and this amount was refunded to petitioner. On November 7, 1935, the Commissioner notified petitioner by registered mail that its claims for refund were rejected to the extent not previously allowed (R. 33).

This suit was filed in the Court of Claims on July 22, 1936, seeking refund on the grounds set forth in the claim of March 4, 1935 (R. 1, 16–17).

Upon the foregoing facts, the Court of Claims held that the suit could not be maintained and dismissed the petition (R. 38).

## ARGUMENT

1. This suit is based upon a claim for refund filed on March 4, 1935, seeking a refund of taxes paid during the year 1928. The claim was not filed within the statutory period of limitations as prescribed by Section 284 of the Revenue Act of 1926, requiring that a claim be filed within three years from the payment of the tax. Petitioner, however, seeks to avoid the bar of the statute of limitations by contending that this claim was an amendment of one or the other of two earlier timely claims. The first timely claim upon which petitioner relies was filed on May 27, 1929, based upon the ground that there was a deficiency assessment then pending against the Osage Oil Corporation, one of petitioner's subsidiaries, and stating that the prosecution of the claim was con-

tingent upon the final determination of the Osage Oil Corporation's tax liability for 1926. Since this claim stated that its prosecution was contingent upon a certain happening, it is doubtful whether it really constituted a valid claim for refund. Cf. *Art Metal Const. Co.* v. *United States,* 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863. If, however, it may be regarded as a valid claim, it was either (1) a specific claim, as the Court of Claims held, or (2) it became a specific claim through amendment by a claim filed February 7, 1931, which for reasons hereinafter stated was a specific claim. In either event it was not subject to amendment after the statutory period for filing claims by another claim based on different grounds. *United States* v. *Andrews,* 302 U. S. 517; *Guantanamo Sugar Co.* v. *United States,* decided by the Court of Claims on April 7, 1941, not yet officially reported but found in 1941 Prentice-Hall, Vol. 4, par. 62,590.

The claim for refund filed on February 7, 1931, was filed as the result of a letter of January 27, 1931, to petitioner advising it that the Commissioner had determined an overassessment in its income tax liability for that year. The claim was for the amount of the proposed overassessment and it was stated that it was based upon the letter of January 27, 1931. In this claim it was further stated that the proposed refund of the overassessment was accepted with the understanding that

such payment should in nowise prejudice the rights of petitioner or of the Osage Oil Corporation to (R. 32)—

> assert, demand and/or maintain * * * claims for refund or credit growing out of the assessment for income taxes for the years 1926 and 1927. * * *

Clearly this claim was a specific one for the refund of the amount of the overassessment and was based upon the same grounds as that of the overassessment, none of which involved any of the items in this suit.

Moreover, the reservation of the right to assert, demand or maintain claims does not in any event meet the requirements of a claim for refund. It is at the most merely an attempt to reserve the right to prosecute claims already filed or file further claims. It has been expressly held that such a general reservation of rights does not amount to a claim for refund. *Art Metal Const. Co.* v. *United States, supra; Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th).

2. The decision of the court below is not in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Kales* v. *United States,* 115 F. (2d) 497, certiorari granted, April 28, 1941, No. 826, this Term. In the *Kales* case, a letter, protesting against a proposed additional assessment resulting from the Commissioner's determination that the value of certain stock was less

than that previously determined, was written by the taxpayer in which she contended that the valuation originally determined by the Commissioner could not be reopened, the last two paragraphs of the letter stating that if it were held that such determination could be reopened then the taxpayer would claim an even higher valuation than that used in her returns. The amount of the additional assessment was paid and suit brought for its recovery, it being finally held that the original determination could not be changed and the amount of the additional assessment was refunded. Thereafter, and after the statutory period for filing claims, the taxpayer filed what purported to be an "amended claim for refund" upon the ground that the value of the stock was even higher than the amount of the Commissioner's first determination. The Circuit Court of Appeals for the Sixth Circuit held that the letter of protest was an informal claim for refund, that in it the taxpayer notified the Commissioner that she intended to press her claim for a higher valuation and that it put the Commissioner on notice of the grounds relied upon in the so-called amended claim. It is our position in our petition for certiorari in the *Kales* case that the court erred in failing to hold that even if the letter be considered as a claim for refund it had become extinguished by the earlier judgment and that in any event the letter did not constitute a claim for refund.

Nevertheless, the decision, even if correct, is not in conflict with the decision in the instant case. In the first place, the claims which are relied upon as subject to amendment in this case are formal and specific ones and the reservation made by petitioner in the claim of January 27, 1931, could not convert them into a general claim. In the second place, except for oral statements made to the Revenue Agent, the grounds upon which this suit is based were never called to the Commissioner's attention prior to the filing of the claim now relied on. In the *Kales* case, the Circuit Court laid stress on the fact that the grounds ultimately set forth in the late claim were called to the Commissioner's attention in the letter of protest. The court in the *Kales* case also refers to T. D. 4266, VIII–1 Cum. Bull. 111, promulgated March 27, 1929, which authorizes the Commissioner to make a refund after the expiration of the statutory period of limitations in any case in which an informal or defective claim filed prior to the expiration of the period of limitations and stating specifically the ground for refund is perfected by the filing of a claim prior to May 1, 1929. That decision also provides that only the grounds set forth in such formal claim, which were also set forth in such informal or defective claim, will be considered. In the instant case, the claim relied upon by petitioner as subject to amendment, and also the so-called amended claim, were both filed after May 1, 1929.

The grounds set forth in the formal claim here in question were never set forth in any informal or defective claim. The oral statements to the Revenue Agent cannot be considered as constituting even an informal claim. *Ritter* v. *United States,* 28 F. (2d) 265 (C. C. A. 3d).

3. Since the claims for refund filed on May 27, 1929, and February 7, 1931, were both specific claims and not subject to amendment, the petitioner's contention (Pet. 6)—

> that the Commissioner of Internal Revenue was fully and timely apprised through examinations of petitioner's affairs, or otherwise, of deductions ultimately claimed in an amended claim for refund filed on March 4, 1935, and that the said amendment was, therefore, permissible

is clearly without merit. In *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, this Court held that the Commissioner could not extend the statutory period for filing claims and that the fact that he may have considered the grounds advanced in an untimely claim was of no avail to the taxpayer. Moreover, there is no indication whatsoever in the instant case that the Commissioner ever considered the grounds raised in the 1935 claim. The only evidence that he was even apprised of such grounds is that in the Revenue Agent's report it was stated that the petitioner was protesting the amount of the proposed overassessment on one of these grounds. The Revenue Agent further stated

in his report that a formal protest would be submitted. This was in 1931, and the petitioner did not thereafter make any protest in this respect and made no further reference to the issues here involved until the claim for refund was filed on March 4, 1935. The Commissioner may well have considered that the petitioner had abandoned these grounds. This is clearly not a case where the Commissioner has misled the petitioner in any way but is simply one where the petitioner has apparently slept on its right.

## CONCLUSION

The decision of the court below is clearly in accord with the decisions of this Court in the *Andrews* and *Garbutt Oil Co.* cases, *supra,* and is correct. No conflict of decision has been shown. The petition should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

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DOCKET NO. 920.

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WRIGHTSMAN PETROLEUM COMPANY, a Corporation, for itself and C. J. WRIGHTSMAN, its sole stockholder and beneficiary in dissolution, *Petitioner*,

v.

THE UNITED STATES.

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## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

---

As pointed out in respondent's Brief in Opposition (Br. 12), this Court on April 28, 1941, granted a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Kales,* No. 826 this Term. In its petition for a writ of certiorari to the said Circuit Court of Appeals, the Government in that case urged as a reason for granting the writ that the taxpayer's unsworn letter of protest of March 23, 1925, which the Circuit Court of Appeals had held to be an informal claim for refund, could not in any view be treated as a proper claim (Pet. 11-13).

In granting the writ in that case this Court evidently thought it a matter of great importance in the administration of the revenue laws to review the decision in the lower Court. By the same token this Court should review the decision of the Court of Claims herein and consider the two cases together in the respect that they involve the narrow question whether a protest or notice to the Commissioner can be deemed a claim for refund subject to perfection by a formal claim.

In the *Kales* case the Circuit Court of Appeals held that the taxpayer's letter of protest was clear notice to the Commissioner and therefore constituted an informal claim which was subsequently perfected by the filing of a formal claim. In the instant case the Court of Claims specifically held that the Commissioner was informally placed on notice in the form of a protest, but this did not suffice as a claim for refund (R. 37). On this issue, therefore, the two decisions are clearly in conflict and respondent's statement that the grounds upon which this suit was based were never called to the Commissioner's attention prior to the filing of the claim now relied upon would seem to be erroneous (Resp. Br. 14).

Should this Court affirm the decision by the Circuit Court of Appeals in the *Kales* case on the question whether a protest is to be deemed a claim for refund, then the decision of the lower Court herein will be clearly wrong. This petitioner would be highly prejudiced, however, and its rights irrevocably lost if in the meantime this petition were denied, because the judgment of the Court below could not be reopened.

Aside from the issue whether a notice or protest can be deemed a claim for refund, the instant case presents a broader and more far reaching question of great importance to the Government and taxpayers generally. Here the Commissioner made a full audit and examination of petitioner's affairs following the filing of a formal claim and was fully apprised of the deductions and facts in support thereof ultimately claimed in the amendment of March

4, 1935. Hence, the important Federal tax question arises as to the permissibility of said amendment under those circumstances within the ambit of this Court's decision in *United States* v. *Andrews*, 302 U. S. 517, 82 L. ed. 398, and the language therein, and *United States* v. *Garbutt Oil Company*, 302 U. S. 528, 82 L. ed. 405.

While the question whether an amended claim is permissible where the Commissioner has already been apprised by audit or otherwise of the items and facts in support thereof claimed in the amendment may have lurked in the record in the Court below in the *Kales* case, this question was not raised in the Government's petition for writ of certiorari. Therefore, the present case, together with the *Kales* case, ought to clarify the law in the field this Court left open in the *Andrews* case as to the sufficiency of a detailed examination and audit of particular items and the facts in support thereof subsequently perfected by a formal claim.

## CONCLUSION.

Therefore, because of the reasons stated in its petition for a writ and because of the foregoing, petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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